Editor's note: Appealed -- aff'd sub nom. Drummond Coal Co. v. Hodel, Civ.No. CV-88-N-1462-S (N.D. Ala. Aug. 1, 1989), aff'd No. 89-7673 (11th Cir. April 3, 1990), mandate issued, April 25, 1990

ALABAMA BY-PRODUCTS CORP.
AND
DRUMMOND COAL CO., INC.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 86-1277 Decided August 1, 1988

Appeal from a decision of Administrative Law Judge David Torbett sustaining Notices of Violation Nos. 84-10-58-1, 85-10-108-1, 85-10-108-2, 85-10-108-3 and Cessation Orders Nos. 85-10-108-3, 85-10-108-4, and 85-10-108-5. Docket Nos. NX 4-54-R, NX 5-93-R, NX 5-31-P, NX 5-32-P, and NX 5-52-P.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

   Whether particular reclamation work is timely must be determined by taking into account the overall circumstances of a surface coal mining and reclamation operation.

2. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

   An extension of time in which to reclaim a minesite granted by the State does not excuse noncompliance with the initial Federal performance standards relating to reclamation.

APPEARANCES: William B. Long, Esq., Jasper, Alabama, for Drummond Coal Company, Inc.; J. Fred McDuff, Esq., Birmingham, Alabama, for Alabama By-Products Corporation; H. Thomas Wells, Jr., Esq., and David M. Smith, Esq., for Drummond Coal Company, Inc., and Alabama By-Products Corporation; Paul A. Molinar, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Alabama By-Products Corporation (Alabama By-Products) and Drummond Coal Company, Inc. (Drummond), have appealed from a decision of Administrative

Law Judge David Torbett dated May 6, 1986, which affirmed Notices of Violation (NOV) Nos. 84-10-58-01, 85-10-108-1, 85-10-108-2, and 85-10-108-3 and Cessation Orders (CO) Nos. 85-10-108-3, 85-10-108-4, and 85-10-108-5. See Appendix. The Office of Surface Mining Reclamation and Enforcement (OSMRE) had issued the NOV's because Alabama By-Products and Drummond had failed to reclaim disturbed mine areas in a timely manner as required by 30 CFR 715.13. OSMRE issued CO's to Drummond when it failed to abate the conditions giving rise to the three NOV's issued earlier. Judge Torbett found that OSMRE properly issued all the NOV's and CO's in accordance with section 521(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. | 1271(a) (1982), and sustained all the NOV's and CO's. He also ordered civil penalties assessed in the amount of $1,100 for NOV No. 85-10-108-2, $1,100 for NOV No. 85-10-108-3, and $1,100 for CO No. 85-10-108-5, but these amounts are not in contention on appeal. 1/

The facts in this case are not in dispute and are summarized by Judge Torbett in his decision as follows:

> The three subject sites of Drummond, Flat Top Mine, North Bagley Mine, and North Morris Mine were mined out in July of 1982 (Tr. 1, pgs. 141, 161, 162, 170, 171). Each site was mined under an interim program permit. The subject site of Alabama By-Products was also covered by an interim program permit at the time the NOV was issued. Gene Robinson, an inspector for the Respondent, inspected the three subject sites of Drummond in January 1985. As a result of these inspections, Inspector Robinson issued three Ten-Day Notices to the State (Exhs. R-1, R-11, R-19). Each Ten-Day Notice specified that Drummond had "failed to reclaim the disturbed area in a timely manner," a violation of 30 CFR | 715.13. In each case, the State of Alabama responded by saying that it had granted an extension of time to complete reclamation (Exhs. R-2, R-3, R-12, R-13, R-21, R-29). The Respondent deemed this response to be inadequate and issued NOV Nos. 85-10-108-1, 85-10-108-2, 85-10-108-3 to Drummond (Exhs. R-4, R-14, R-23). Cessation orders were later issued to Drummond for failure to abate these NOV's.
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> Ottis Windham, an inspector for the Respondent, inspected the Knob Creek Mine of Alabama By-Products in February 1985 (Tr. 1, pg. 97). A Ten-Day Notice was issued to the State. The violation was for failure to reclaim in a timely manner (Exh. R-31). The State of Alabama responded by saying that a reclamation extension was granted. The Respondent issued NOV No. 84-10-58-1 (Exh.

1/ We are puzzled why the record contains no notices of proposed assessment of the penalties from OSMRE nor any petitions for their review from Drummond. In any event, at a pretrial hearing held on July 24, 1985, the parties stipulated that the proposed civil penalties assessed in connection with the violations were accurate if the violations were sustained. Therefore, only the fact of the violations and not the amount of proposed civil penalties were at issue in the final review proceeding (Tr. 2 at 9-10).

> R-32). Alabama By-Products had this site repermitted under the permanent program and the NOV was terminated (Exh. R-33).

(Decision at 3).

Alabama By-Products filed a timely application for review of the NOV issued to it. With one exception, (see note 2 below), Drummond also filed timely applications for review of the NOV's issued to it. By motions filed in March and April 1985, Drummond suggested review of the NOV's issued to it be consolidated with review of the Alabama By-Products NOV. On April 11, 1985, Judge Torbett granted Drummond's March motion to consolidate two of its applications with the Alabama By-Products application.

On May 13, 1985, OSMRE attempted to serve cessation orders on Drummond for failure to abate the violations cited in its three NOV's; the CO's were served by mail on May 14. Also on May 13, 1985, Alabama By-Products and Drummond filed a joint application for temporary relief from the NOV's pursuant to section 525 of SMCRA, 30 U.S.C. | 1275 (1982). After a hearing held on May 15-16, 1985, Judge Torbett denied temporary relief from the NOV's and CO's because he found there was no substantial likelihood that the applicants would ultimately prevail on the merits of these cases. 2/ On June 5, 1985, the United States District Court for the Northern District of Alabama granted Drummond temporary relief under 30 U.S.C. | 1276(c) (1982) and temporarily enjoined OSMRE from enforcing the CO's issued to Drummond. (Drummond Coal Co. v. Hodel, Civil Action No. 85-AR-1411-S, June 5, 1985). Subsequently, Judge Torbett held a hearing on permanent relief on August 27, 1985.

On May 6, 1986, Judge Torbett issued his decision. He found that OSMRE had authority to directly enforce interim program standards in Alabama without regard to the State's action or inaction (Decision at 4). He held that,

2/ The Judge decided, with the consent of the parties, that the hearing would be conducted on the application for temporary relief, but that the record made would apply to the decision on permanent relief (Tr. 1 at 4-5). At that hearing Judge Torbett dismissed NX 5-93-R (concerning review of NOV 85-10-108-1 issued for the Flat Top mine) because the application for review was not timely filed, but accepted testimony on the fact of the violation at the Flat Top Mine, with the agreement of the parties, in anticipation of the filing of a petition for review of the civil penalty for that violation (later docketed as NX 5-52-P) (Tr. 1 at 14-15). While this procedure may have been practical for purposes of hearing, there is no provision in the regulations for waiver of the requirement, characterized as jurisdictional by this Board, that there be a timely filing for review. McPeek Mining v. OSMRE, 101 IBLA 389, 392 (1988). Furthermore, even if this Board could find that it had jurisdiction to proceed with this matter, the fact of violation cannot be contested on review of a cessation order where there has not previously been a timely appeal of the notice of violation. P & K Coal Co. v. OSMRE, 98 IBLA 26, 33 (1987). The violation concerning the Flat Top mine, never having been properly before the Administrative Law Judge, must therefore be allowed to stand.

considering "the overall circumstances of a coal mining and reclamation operation," see Old Home Manor, Inc., 3 IBSMA 241, 248, 88 I.D. 737, 741 (1981), including degree of environmental harm, state of the coal market, adequacy of bonding of the sites, history of the operators' compliance, and reclamation currently in progress, "a 2\ year period between the completion of mining and the completion of reclamation [is] simply too long a period of time to be construed as timely reclamation" under 30 CFR 715.13, especially in view of the legislative history of the reclamation requirements of the Act (Decision at 5). He found OSMRE's policy of rejecting extensions granted by Alabama for the completion of reclamation, if the extensions involved areas covered by interim program permits that would not be re-permitted under the permanent program (see below), as "applied specifically to each mine in question supports a finding that [OSMRE] acted properly and with good cause to issue the notices and orders at issue in these cases" (Decision at 8). Finally, he concluded that OSMRE's policy was not a rulemaking that required notice and comment in accordance with the Administrative Procedure Act.

In order to understand appellants' arguments on appeal it is necessary to know that, in each of the NOV's issued to Drummond, the inspector offered the following alternative: either perform the required corrective action or "obtain permanent program permit that covers unreclaimed area." Similarly, the inspector gave Alabama By-Products the following choice: either perform the required corrective action or "submit all necessary documents to the ASMC [Alabama Surface Mining Commission] to have this area included in the permanent program permit."

It is also important to know OSMRE's standard for determining whether or not to grant an extension of time for an interim program permit reclamation schedule. This standard is set forth in a letter from John T. Davis, Director of the Birmingham Field Office (BFO), dated April 16, 1984, to Virgil Willett, ASMC Director:

> Dear Mr. Willett:
>
> The purpose of this letter is to define the criteria the BFO will use to evaluate time extensions granted for any interim program permit reclamation schedule.
>
> The BFO does recognize the ASMC Director's authority to grant time extensions for any interim permit reclamation schedule under the 1975 Alabama statute. However, this authority does not prevent OSM[RE] from exercising independent judgment when these extensions are viewed as unreasonable, as a lingering responsibility and duty of the federal interim program.
>
> In general, the BFO will evaluate each extension on a case-by-case basis. However, we will generally view as reasonable all extensions granted to interim program permits in cases where such a permit will become an integral part of a permanent program permit through a pending amendment or as a pending permanent permit.

Extensions cannot be granted using the 1975 Alabama statute provision to any interim program permit mined subsequent to January 20, 1983 and will be viewed as unreasonable by the BFO.

If an extension is judged as being unreasonable, the BFO will issue a Ten Day Notice.

Willett wrote to OSMRE requesting clarification concerning OSMRE's policy regarding extensions of time to reclaim. He referred to the April 16 letter and then quoted from a "Special Study" which OSMRE had made of all acreage that had been mined under the interim program permit but not included in the operator's permanent program permit. The Special Study stated: "The bottom line is that all extensions will be viewed as unreasonable except when a pending permanent program permit or amendment will encapsulate the minesite." See Joint Exh. 1, Attachment 4, at 1.

After quoting the April 16 letter and the "bottom line" of the Special Study, Willett stated in his letter: "You will note a distinct difference in emphasis. The policy memorandum states that case-by-case determinations will be made by BFO. The Special Study arbitrarily dismisses all extensions for sites not covered by pending permits or extensions" (Exh. A-11, emphasis in original).

By letter dated September 10, 1984, Davis responded to clarify the position of BFO as follows: "You are absolutely correct in concluding that all extensions for sites not covered by pending permanent program permits or amendments will be deemed inappropriate" (Exh. A-12).

In their statement of reasons, Drummond and Alabama By-Products point out that section 9-16-39(g) of the Alabama Surface Mining Reclamation Act of 1975 (1975 State Act) authorized the Director of ASMC to grant extensions of reclamation deadlines. 3/ The 1981 State act contains the approved permanent program in Alabama. Appellants contend that the 1981 State act in addressing the interim permitted lands, continues the authorization to grant extensions. Ala. Code | 9-16-80(c). 4/ Thus, according to the appellants,

3/ Appellants quote section 9-16-39(g) as having provided as follows:

"(g) Regrading shall begin within 6 months after the beginning of operations, unless such regrading is prevented by act of God such as unseasonable weather or labor disputes or unless otherwise extended by the director for reasonable cause; provided, that in those operations where the mining method utilized would result in the placing of overburden on regraded areas, such regrading shall be commenced as soon as practicable compatible with such mining method, provided further, that the applicant shall complete the contouring of all affected land within six months from the date of the completion of operations, unless such regrading is prevented by act of God, such as unseasonable weather or labor disputes or unless otherwise extended by the director for reasonable cause."

4/ This section provides that all power conferred upon the Alabama Surface Mining Reclamation Commission, its commissioners, and director by article 2, chapter 16, Title 9 shall be conferred upon the reconstituted commission as

as to the acreage mined and bonded under interim program permits, the Alabama State Director retained the same power to supervise the reclamation of such lands as he had under the interim program. In addition, appellants contend that as to the areas permitted under the interim program, this provision carried forward the 6-month time limit for reclamation found in the 1975 State Act as well as the State Director's authority to grant extensions of this specific time limit "for reasonable cause."

Appellants contend that OSMRE acted arbitrarily and capriciously when it overturned the State-granted extensions. Appellants contend that in issuing the NOV's and CO's, OSMRE was following the BFO policy enunciated in BFO's letter of April 16, 1984, that considered any State-granted extension to be unreasonable per se if such extension applied to acreage that was covered by an interim program permit but not by a permanent program permit. Appellants point out that this policy is demonstrated further by the action required to abate the NOV's: either reclaim or obtain a permanent program permit on the land in question.

Appellants state that by applying the BFO policy, OSMRE ignored all the really relevant factors which should have determined action in the case, most of which had been considered by the ASMC Director:

> These included the lack of environmental harm from the delay, the fact that runoff was being controlled, monitored, and treated if necessary during the extension, the economic considerations of the depressed coal market, the adequacy of the bonds (especially given the relatively small areas left to be regraded), the history of Drummond's and ABC's compliance with reclamation laws and regulations, the fact that reclamation was ongoing at Flat Top Mine, the fact that all the areas had been substantially regraded already with the highwalls eliminated, as well as the fact that these areas are actually small portions of larger mine sites which had merely been segregated for permitting purposes, and the fact that the mines had been temporarily closed so that no workers were at the site to accomplish work.

(Brief at 32).

Appellants assert that OSMRE's action does not have a rational basis. Appellants explain that the only facts to be considered under the BFO pol-
icy were whether the areas in question were covered by permanent program permits or not. This "fact," appellants state, was the sole criterion used by BFO to determine whether the reclamation was timely under the regulations. Appellants conclude that there is no rational connection between the permitting status of the land and the timeliness of the reclamation.

fn. 4 (continued)
the director may delegate for the purpose of winding up, continuing to enforce, etc. matters and business commenced under article 2, chapter 16, Title 9 which is synonymous with the 1975 State act.

Appellants, citing Clinchfield Coal Co. v. Hodel, CV No. 85-0113-A (D. W. Va. June 20, 1985) (affirmed on Motion for Reconsideration on Sept. 25, 1985), assert that OSMRE's issuance of an NOV in the absence of imminent environmental harm is unauthorized and unlawful.

OSMRE responds that it had authority to issue the NOV's and CO's in question. OSMRE explains that enforcement action was taken 2 years after the State of Alabama received primacy on May 20, 1982. The four sites involved were mined under interim program permits and were mined out by July of 1982. OSMRE asserts that while the Judge held that OSMRE retained authority to engage in direct enforcement of the interim regulations over these four interim mines, such a finding was not necessary to establish OSMRE's regulatory jurisdiction. OSMRE claims that it acted within the scope of its permanent program enforcement authority when it issued the 10-day notices, NOV's, and CO's.

OSMRE points out that appellants' argument that OSMRE exceeded its permanent program oversight authority in Alabama by issuing these enforcement actions is based on Clinchfield Coal Co. v. Hodel, supra. This decision, however, was reversed by the United States Circuit Court of Appeals for the Fourth Circuit. Clinchfield Coal Co. v. Department of Interior, No. 85-2206 (4th Cir. Aug. 27, 1986). OSMRE points out that 30 CFR 843.12(a)(2) authorizing OSMRE to issue 10-day notices to the State, NOV's, and CO's, was promulgated in final form at 47 FR 35638 (Aug. 16, 1982).

The Fourth Circuit Court held thereafter that any challenge of 30 CFR 843.12(a)(2) is controlled by 30 U.S.C. | 1276(a)(1) (1982) which requires that such an action be brought in the United States District Court for the District of Columbia within 60 days of promulgation of the regulation. As a result, OSMRE points out, the court of appeals found that Clinchfield's challenge of 30 CFR 843.12(a)(2) could not be heard by the United States District Court for the Western District of Virginia. Also, the court of appeals, in reversing the district court, affirmed OSMRE's permanent program oversight authority under 30 CFR 843.12(a)(2) to issue enforcement actions on a mine-by-mine basis.

OSMRE asserts that appellants' failure to reclaim the minesites is a violation of 30 CFR 715.13. OSMRE cites Old Home Manor, Inc., supra, and the legislative history of SMCRA to support the contention that appellants have not reclaimed the minesites "in a timely manner" as required by 30 CFR 715.13.

OSMRE argues that appellants are attempting to excuse their failure to reclaim the areas in question for more than a year by blaming a poor coal market and hiding behind a reclamation extension given them by the State regulatory agency under the 1975 state law, Ala. Code | 9-16-80 (1975). OSMRE refers to the legislative history of SMCRA which states that minesites should be reclaimed concurrently with mining operations. Congress, it is argued, allowed only one exception from the rule, that being for the conduct of a combined surface and underground operation. OSMRE asserts that the State's reclamation extensions are not authorized by the Act and have never been approved by OSMRE. OSMRE explains that it exercised its own independent enforcement authority under its own regulations and took action that is amply supported by the record.

OSMRE points out that at the time of the April 16, 1984, letter, mining on all interim program sites had to have been stopped by at least January 30, 1983. See 47 FR 22057 (May 20, 1982); 30 CFR 901.10; 30 U.S.C. | 1256(a) (1982). Therefore, OSMRE asserts, all minesites to which the letter might apply had already been unreclaimed for at least 15 months. OSMRE contends that this is not timely reclamation and further notes that the only exception allowed would be if the site was to be used as part of a permanent program surface mining operation that was to be deep mined.

OSMRE asserts that the BFO policy was not the only factor considered before enforcement action was taken. OSMRE states that after it was determined that an interim program site remained unreclaimed and that no further mining of the area had been planned, i.e., no application had been filed for a permanent program permit, then an inspection was ordered. OSMRE asserts that during the course of the inspection, OSMRE determined whether timely reclamation was progressing or whether circumstances such as a labor strike made timely reclamation impossible. OSMRE explains that no enforcement action was issued until the inactive and unreclaimed status of the site was verified and impossibility discounted. According to OSMRE, after the inspection was held, the facts peculiar to each minesite were considered and the determination was then made as to whether reclamation was proceeding in a timely manner.

We must first discuss under what authority OSMRE may take enforce- ment action for failure to comply with requirements of the initial (or interim) regulatory program in a state that has an approved permanent regulatory program. OSMRE issued the NOV's and CO's in this case under section 521(a)(1) of SMCRA, 30 U.S.C. | 1271(a)(1) (1982), and 30 CFR 843.12(a)(2) after giving Alabama the 10-day notice required by those provisions and determining that Alabama did not have good cause for not taking appropriate enforcement action. See Peabody Coal Co. v. OSMRE, 95 IBLA 204, 94 I.D. 12 (1987). The Judge stated that because appellants did not intend to mine the areas involved later than 8 months after Alabama's permanent regulatory program was approved in May 1982, they were not required to obtain permanent program permits for those areas, citing 30 U.S.C. | 1252(d) (1982). He then reasoned that "[a]s long as an area is covered by an interim program permit * * * the interim regulations and enforcement standards apply" (emphasis added), citing Citizens for the Preservation of Knox County, 81 IBLA 209, 219 (1984). OSMRE was authorized by section 521(a)(3) of SMCRA, 30 U.S.C. | 1271(a)(3) (1982), "to issue NOV's after a Federal inspection of a site when the Federal inspection is pursuant to section 502 of the Act," he wrote, and section 502(e) authorizes Federal inspections during the interim program. Therefore, OSMRE need not have issued the 10-day notices it did, although it was authorized to issue the NOV's and CO's, the Judge concluded (Decision at 4).

The difficulty with this analysis is that although reclamation of the areas involved was covered by initial program permits and performance standards, the initial regulatory program was not in effect in Alabama at the time of the inspections and enforcement actions. Citizens for the Preservation of Knox County, supra, held that, in a state with an approved permanent program, when only reclamation remains to be done of mining completed

during the initial regulatory program, an operator need not obtain a permanent program permit for that reclamation and the initial program regulations apply to the reclamation. 5/ It does not follow, however, that initial program enforcement procedures under 30 CFR Part 722 apply to such sites during the permanent program. The Secretary is authorized to implement an initial regulatory program in a state only "until a State program has been approved or until a Federal program has been implemented." 30 CFR 710.3(a). "After approval of the State program, the State regulatory authority has responsibility for * * * enforcement of the State program." 30 CFR 701.4(a). "While a State regulatory program is in effect, [OSMRE's] responsibility includes * * * (3) Issuing notices of violation when a State regulatory authority fails to take appropriate action to cause a violation to be corrected * * *." 30 CFR 701.4(b). Thus, because a state program was in place in Alabama at the time of the inspections and enforcement actions in this case, OSMRE was authorized by 30 U.S.C. | 1271(a)(1) (1982) and 30 CFR 843.12(a)(2) to issue the NOV's and CO's to appellants and properly issued Alabama 10-day notices in accordance with those provisions before doing so.

[1] Provisions of 30 U.S.C. | 1202(e) (1982) require the operator to "reclaim the surface area as contemporaneously as possible with the surface coal mining operations." 30 CFR 715.13(a), the applicable initial program performance standard, provides that "[a]ll disturbed areas shall be restored in a timely manner." The meaning of the word "timely" was considered in Old Home Manor, Inc., supra:

> The first issue is whether OSM[RE] can require a permittee to satisfy the performance standards of 30 CFR 715.14 within a particular time. As Manor correctly points out, the provisions of sec. 715.14 do not contain a time schedule for completion of backfilling and grading operations. These provisions, however, must be read in conjunction with the Act and other regulations. Specifically, 30 CFR 715.13(a) provides that "[a]ll disturbed areas shall be restored in a timely manner." This requirement, in turn, correlates with sec. 102(e) of the Act, 30 U.S.C. | 1202(e) (Supp. II 1978), in which one purpose of the surface mining legislation is specified to be "[to] assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations." (Italics added.) These provisions demonstrate that timing is an important factor in OSM[RE]'s evaluation of a permittee's compliance with the performance standards in 30 CFR 715.14.

5/ "[W]e conclude that where * * * there was a permanent cessation of operations at the [mine] prior to the approval of the State permanent program permit, the remaining reclamation operations may be completed under the interim regulations." 81 IBLA at 218. "Since Midland need not comply with the permanent program, its reclamation operations will continue to be subject to the interim permit requirements, with OSM and Illinois invested with the authority to continue enforcement of the interim permit until the work has been completed." Id. at 219. See Tr. 1 at 25-26.

> * * * Whether particular reclamation work is "timely" must be determined taking into account the overall circumstances of a surface coal mining and reclamation operation. [Footnote omitted.]

Id. at 247-48, 88 I.D. at 740-41. See also Clear Creek Coal Co. v. OSMRE, 101 IBLA 6 (1988). The legislative history of SMCRA provides the following insight as to what is considered timely:

> Both reg[ra]ding and revegetation must be integrated into the total mining plan of the operator. Some of the most serious offsite environmental impacts result from exposure of overburden to the weather with consequent erosion, sedimentation, siltation, acid drainage, landslides, and leaching of toxic chemicals. The essence of good reclamation therefore consists of reducing as much as possible the time from initial disturbance of the land surface to the successful re-establishment of a vegetative cover on stable spoil areas. In order to achieve this, performance standards relating to environmental protection must be carried on concurrently with the mining operations, except under special circumstances.

H.R. Rep. No. 218, 95th Cong., 1st Sess. at 79 (1977).

The Senate report addressed the "special circumstances" in which reclamation could be extended by stating:

> The Committee was adamant that there should be no broad exceptions to the vital mining and reclamation standards of this bill. To provide for unlimited exceptions would render the bill meaningless, since it would then be likely that the exceptions would become the rule. On the other hand, the Committee did recognize that there are some valid and important reasons for allowing limited variances to the prescribed standards of the bill, where such variances provide equal or better protection to the environment, and result in a higher post-mining land use. For this reason, there are two provisions in the bill which per-mit variances to the mining-reclamation standards of the bill. One variance would allow surface mine operators to postpone reclamation of limited segments of his [sic] mined area where he [sic] can prove to the regulatory authority that such segments are necessary to the operation of a planned underground coal mine. The committee believes an allowance of this sort will ensure maximum recovery of the coal resource and reduce the total surface disturbance so long as the stringent conditions attached to the granting of the variance are strictly adhered to.
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> * * * * * * *
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> Variances from the requirement that the reclamation proceed as contemporaneously as possible may be granted, thus allowing the provisional retention of highwalls and benches in limited and

> specific areas where underground mine openings or facilities are planned in conjunction with a surface mining operation. The Committee does not regard this authority to postpone reclamation and restoration of a mined area as justifiable for any reason except facilitating maximum recovery of the coal resource by underground mining. [Emphasis added.]

S. Rep. No. 128, 95th Cong., 1st Sess. at 55, 83 (1977).

At the hearing OSMRE established that the sites had been mined out in July 1982 (Tr. 1 at 141, 161, 162, 170, 171), and that when the NOV's and CO's were issued in 1985, reclamation had not been completed (Tr. 1 at 35, 73, 83, 98). Witnesses for OSMRE testified that the disturbances at the sites were relatively old (Tr. 1 at 93, 98). In issuing the NOV's, OSMRE considered the amount of reclamation that remained to be accomplished, the areas involved and the length of time that had expired (Tr. 1 at 47, 64). OSMRE makes a prima facie case by the submission of sufficient evidence to establish the essential facts of a violation. Turner Brothers, Inc. v. OSMRE, 100 IBLA 365 (1988); Turner Brothers, Inc. v. OSMRE, 92 IBLA 381 (1986); James Moore, 1 IBSMA 216, 86 I.D. 369 (1979). When this evidence is unrebutted by appellant, the violation will be sustained on appeal. Turner Brothers, Inc. v. OSMRE, 100 IBLA 365 (1988).

[2] Appellants do not purport to have reclaimed the minesites. Nor have they shown that underground mining will take place on the sites which would allow them to postpone reclamation as explained in the Senate report. Appellants do contend, however, that OSMRE should not have issued the NOV's for failure to comply with 30 CFR 715.13 because the State had granted them extensions of time to reclaim the areas. Appellants, however, cannot use the extensions granted by the State as a defense to timely reclamation. 30 CFR 720.11 states that

> [n]othing in the Act or these regulations shall be interpreted to preclude a State from exercising its authority to enforce State law, regulations, and permit conditions, unless compliance with the State law, regulations, or permit condition[s] will preclude compliance with these regulations.

Therefore, proceeding under this regulation, if the extensions granted by the State 6/ conflict with 30 CFR 715.13, then the Federal regulation must prevail. We find OSMRE properly refused to recognize the extensions.

6/ OSMRE does not contend that the 1981 statute conflicts with SMCRA. OSMRE asserts that the 1981 Alabama Act merely provided the Director, ASMC, with the authority to administer the commission. OSMRE states that the statute, on its face, does not grant any authority to the Director to allow for reclamation extensions. According to OSMRE, the only conflict with SMCRA arises from the Director's interpretation that the 1981 Act vests the authority to grant these extensions. We need not decide which is the correct interpretation because the result is the same, i.e., OSMRE was correct in not recognizing the extensions.

The Board recently considered a similar situation in Clear Creek Coal Co., supra, and there upheld the issuance of the NOV's and CO's because reclamation had not occurred "as contemporaneously as possible," as required by SMCRA. On appeal Clear Creek did not dispute the factual assertion made by OSMRE. Rather, it contended that because its reclamation activities were proceeding according to a state approved plan and schedule, the NOV's and CO's were improperly issued. Appellant argued the issuance of the NOV constituted a repudiation by OSMRE of the agreement between the state regulatory authority and appellant. We found that the ultimate question presented on appeal was whether appellant was in compliance with the initial performance standards. Quoting the Interior Board of Surface Mining and Reclamation Appeals (IBSMA), the Board stated that "compliance with a state mining permit does not change obligations under Federal law and does not excuse noncompliance with the initial performance standards." Mountain Enterprises Coal Co., 3 IBSMA 338, 346-347; 88 I.D. 861, 865 (1981). See also Cedar Coal Co., 1 IBSMA 145, 86 I.D. 250 (1979). Similarly, an extension granted by the State does not excuse noncompliance with the initial performance standard in 30 CFR 715.13. The only circumstances under which the time for reclamation could have been extended would have been if the operator intended to engage in underground mining on the sites.

Appellants contend that OSMRE did not consider environmentally relevant factors in issuing the NOV's and CO's but rather applied the BFO policy that no extensions for reclamation could be granted unless the permittee had applied for a permanent program permit. Appellants referred to the alternative given in the NOV's - reclaim or apply for a permanent program permit. We agree with appellants that applying for a permanent program permit is not relevant to the timeliness of reclamation and should not have been an alternative to reclamation in the NOV's. Also, appellants are correct that when coal mining allowed under an interim program permit ceases and only reclamation remains to be accomplished, the operator is not required to apply for a permanent program permit. See Citizens for the Preservation of Knox County, supra at 209.

Even though the application by appellants for a permanent program permit was not a proper alternative, we find that does not affect the validity of the NOV's and CO's which were issued. OSMRE properly notified appellants in the NOV's that they were in violation of interim program regulation 30 CFR 715.13. OSMRE has shown that the charged violations did exist and that the NOV's and CO's were properly issued. As was true in Clear Creek Coal, supra, the ultimate issue in this case is whether appellants had timely reclaimed their sites. Considering all the circumstances, we find that they had not done so. Therefore, the NOV's and CO's are sustained and the penalties are assessed as directed by the Administrative Law Judge.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified by this opinion.

Franklin D. Arness
Administrative Judge

We concur:

Kathryn A. Lynn
Administrative Judge
Alternate Member

Will A. Irwin
Administrative Judge

APPENDIX

The following list provides pertinent docket information for each mine:

Alabama By-Products Corporation	Docket No. NX 4-54-R Notice of Violation No. 84-10-58-01 Knob Creek Mine
Drummond Coal Co., Inc.	Docket No. NX 5-31-P Civil Penalty Proceeding and Application for Review Notice of Violation No. 85-10-108-2 Cessation Order No. 85-10-108-4 N. Morris Mine
Drummond Coal Co., Inc.	Docket No. NX 5-32-P Civil Penalty Proceeding and Application for Review Notice of Violation No. 85-10-108-3 Cessation Order No. 85-10-108-3 N. Bagley Bend Mine
Drummond Coal Co., Inc.	Docket No. NX 5-93-R Application for Review Notice of Violation No. 85-10-108-1 Flat Top Mine
Drummond Coal Co., Inc.	Docket No. NX 5-52-P Civil Penalty Proceeding Cessation Order No. 85-10-108-5 Flat Top Mine